7-14-2011

Peck v. Idaho Department of Transportation Appellant's Brief Dckt. 38542

IN THE SUPREME COURT OF THE

STATE OF IDAHO

RAYMOND SCOTT PECK, Petitioner/Appellant, v. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent/Respondent.	)	DOCKET NO. 38542-2011 Bonner County Case No. CV-2010-0047 APPELLANT'S BRIEF

APPELLANT'S BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner

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THE HONORABLE STEVE VERBY, DISTRICT JUDGE, PRESIDING

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an administrative driver's license suspension case. Raymond Scott Peck (herein "Peck" or "Appellant") appeals from the decision of the Idaho Department of Transportation in the Findings of Fact And Conclusions of Law and Order entered January 8, 2010 suspending Peck's driver's license and from the decisions of the District Court in the Decision On Appeal, entered September 28, 2010, and in the Order On Petition For Rehearing, entered on December 28, 2010, upholding the suspension of Peck's driver's license.

II. COURSE OF THE PROCEEDINGS

On or about January 8, 2010, the Idaho Transportation Department entered its Findings Of Fact And Conclusions Of Law And Order sustaining a Notice of Suspension served upon Peck pursuant to Idaho Code § 18-8002A by a City of Sandpoint Police Officer on December 2, 2009. R. Pgs. 8-20. Peck filed his Petition For Judicial Review And Ex Parte Application For Stay Of Agency Decision on January 14, 2010 with the District Court. R. Pgs. 4-20.

Following briefing and oral argument, the District Court issued its Decision On Appeal on September 28, 2010 upholding the suspension. R. Pgs. 63-76. Following a petition for rehearing, etc. and a response and oral argument, the District Court issued its Order On Petition For Rehearing on December 28, 2010, upholding the suspension. R. Pgs. 87-95. This appeal follows.

III. CONCISE STATEMENT OF FACTS

The Appellant Raymond Scott Peck is a resident of Bonner County, Idaho. On December 2, 2009, Peck turned left from the business known as the Wily Widgeon driveway onto Highway 200. Peck traveled on Highway 200 to the intersection with US 95, and continued traveling southbound on US 95. The distance Peck traveled exceeded 600 feet in length. Sandpoint Police Officer Nolan Crossley initiated a traffic stop upon Peck for traveling 45 miles per hour prior to the North Information Center on US 95. There are no structures along the highway for the entire distance traveled by Peck prior to the stop being initiated. December 29, 2009 Transcript, Pgs. 3-5.

During the traffic stop, Peck did not complete any field sobriety tests. At the station, while in custody, following the first 15 minute observation period, Peck submitted to the breath test, with an invalid result. A second 15 minute observation period was commenced, during which time Peck opened his mouth and belched, and also patted or tapped on his chest with his fist, all in the presence of the officer. No additional or new 15 minute observation period was commenced. Less than one minute elapsed between the time of the belch and the breath testing conducted. The breach test results were .083/.086. December 29, 2009 Transcript, Pgs. 5-7.

Peck was cited by SPD Citation No. 41744 with a violation of "Excess of Max Speed Limit 49-654(2) 45 mph in posted 35 mph zone," which is the basis for the stop resulting in the request for blood alcohol content (BAC) testing.

ISSUES ON APPEAL

The Appellant Peck's statement of the issues on appeal is as follows:

(a) Was the hearing properly noticed and held pursuant to statute?

(b) Was the Petitioner fully informed of the consequences of testing so as to conform to due process?

(c) Is the Affidavit so lacking as to be not credible?

(d) Did probable cause grounds exist for the stop?

(e) Were the BAC test results obtained in conformance with the testing procedures?

ATTORNEY FEES ON APPEAL

The Appellant Peck seeks to keep alive the possibility of an award attorney fees on appeal against the Respondent State of Idaho, Department Of Transportation pursuant to Idaho Code § 12-117, if then applicable.

ARGUMENT ON APPEAL

I. THE STANDARD OF REVIEW FOR THE SUSPENSION OF A PERSON'S DRIVER'S LICENSE

The standard of review for a decision by the State of Idaho, Department of Transportation to suspend a person's driver's license was recently reiterated by the Idaho Court of Appeals in Bennett v. State, Dept. of Transp., 147 Idaho 141, 142-43, 206 P.3d 505, 506-07 (Idaho Ct. App. 2009), as follows:

> The Idaho Administrative Procedures Act (I.D.A.P.A.) governs the review of department decisions to deny, cancel, suspend, disqualify, revoke, or restrict a person's driver's license. *See* I.C. §§ 49-201, 49-330, 67-5201(2), 67-5270. In an appeal from the decision of the district court acting in its appellate capacity under I.D.A.P.A., this Court reviews the agency record independently of the district court's decision. *Marshall v. Idaho Dep't of Transp.*, 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct.App.2002). This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. I.C. § 67-5279(1); *Marshall,* 137 Idaho at 340, 48 P.3d at 669. This Court instead defers to the agency's findings of fact unless they are clearly erroneous. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998); *Marshall,* 137 Idaho at 340, 48 P.3d at 669. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. *Urrutia v. Blaine County, ex rel. Bd. of Comm'rs,* 134 Idaho 353, 357, 2 P.3d 738, 742 (2000); *Marshall,* 137 Idaho at 340, 48 P.3d at 669.
>
> A court may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3) and that a substantial *143 **507 right of that party has been prejudiced. *Price v. Payette County Bd. of County Comm'rs,* 131 Idaho 426, 429, 958 P.2d 583, 586 (1998); *Marshall,* 137 Idaho at 340, 48 P.3d at 669. If the agency's decision is not affirmed on appeal, "it shall be set aside ... and remanded for further proceedings as necessary." I.C. § 67-5279(3).
>
> The administrative license suspension (ALS) statute, I.C. § 18-8002A, requires that the ITD suspend the driver's

license of a driver who has failed a BAC test administered by a law enforcement officer. The period of suspension is ninety days for a driver's first failure of an evidentiary test and one year for any subsequent test failure within five years. I.C. § 18-8002A(4)(a). A person who has been notified of an ALS may request a hearing before a hearing officer designated by the ITD to contest the suspension. I.C. § 18-8002A(7). At the administrative hearing, the burden of proof rests upon the driver to prove any of the grounds to vacate the suspension. I.C. § 18-8002A(7); *Kane v. State, Dep't of Transp.*, 139 Idaho 586, 590, 83 P.3d 130, 134 (Ct.App.2003). The hearing officer must uphold the suspension unless he or she finds, by a preponderance of the evidence, that the driver has shown one of several grounds enumerated in I.C. § 18-8002A(7) for vacating the suspension. Those grounds include:

> (a) The peace officer did not have legal cause to stop the person; or
> (b) The officer did not have legal cause to believe the person had been driving or was in actual physical control of a vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
> (c) The test results did not show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
> (d) The tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the requirements of section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered; or
> (e) The person was not informed of the consequences of submitting to evidentiary testing as required in subsection (2) of this section.

I.C. § 18-8002A(7). The hearing officer's decision is subject to challenge through a petition for judicial review. I.C. § 18-8002A(8); *Kane*, 139 Idaho at 589, 83 P.3d at 133.

II. THE LICENSE SUSPENSION HEARING WAS NOT HELD PURSUANT TO THE REQUIRED STATUTORY NOTICE

Idaho Code § 18-8002A(7) Administrative hearing on suspension, provides in relevant part as follows:

> A person who has been served with a notice of suspension after submitting to an evidentiary test may request an administrative hearing on the suspension before a hearing officer designated by the department. The request for hearing shall be in writing and must be received by the department within seven (7) calendar days of the date of

> service upon the person of the notice of suspension, and shall include what issue or issues shall be raised at the hearing. The date on which the hearing request was received shall be noted on the face of the request.
>
> If a hearing is requested, the hearing shall be held within twenty (20) days of the date the hearing request was received by the department unless this period is, for good cause shown, extended by the hearing officer for one ten (10) day period. Such extension shall not operate as a stay of the suspension, notwithstanding an extension of the hearing date beyond such thirty (30) day period. Written notice of the date and time of the hearing shall be sent to the party requesting the hearing at least seven (7) days prior to the scheduled hearing date. The department may conduct all hearings by telephone if each participant in the hearing has an opportunity to participate in the entire proceeding while it is taking place.
>
> ***

Peck's request for hearing was timely made on December 8, 2009 (Agency R., pgs 13-14). The State of Idaho, Department of Transportation (herein "ITD") issued several notices thereafter. On December 15, 2009, the ITD first issued by U.S. Mail its Notice Of Telephonic Hearing (Agency R., pg 20) setting December 29, 2009 as the hearing date with hearing officer Mark Richmond, and then issued by U.S. Mail its Show Cause Letter (Agency R., pg 21) citing a conflict with hearing officer Mark Richmond's schedule to justify an extension beyond the required 20 day statutory deadline request, within a single 10 day statutory extension.

On December 18, 2009, the ITD first issued by fax at 2:19 p.m. its Notice of Telephonic Hearing (Agency R., pgs 22-23) changing the date to December 9, 2009 and changing the hearing officer to Eric Moody, and then issued by fax at 3:40 p.m. its Show Cause Letter (Agency R., pgs 24-25) citing a change of the designated hearing officer.

The telephonic hearing was conducted on December 29, 2009 by the State of Idaho, Department Of Transportation with Hearing Officer Eric Moody, not on the date of December 9, 2009 that was scheduled for the hearing and beyond the 20 day statutory deadline for holding such hearing. The Notice of Telephonic Hearing and Show Cause Letter, each dated December 15, 2009 (Agency R., pgs 20-21) provided for hearing officer Mark Richmond and a hearing date of December 29, 2009. The Notice of Telephonic Hearing and Show Cause Letter, each dated December 18, 2009 (Agency R., pgs 22-25) provided for the hearing to be December 9, 2009 before hearing officer Eric Moody. The hearing was not conducted pursuant to the noticed date of December 9, 2009, nor was the hearing held in compliance with the statutory time limits of Idaho Code 18-8002A.

The December 18, 2009 Notices changed both the hearing officer and the hearing date. In addition, once the hearing officer was changed to Eric Moody, there was not a show cause letter or assertion to exceed the 20 day hearing deadline in Idaho Code 18-8002A(7). The basis for the December 29 hearing date was that the hearing officer Mark Richmond had a scheduling conflict. There is nothing in the record to support holding the hearing on December 29 and there is nothing in the record to exceed the 20 day period for hearing officer Eric Moody. The hearing was held on a then unnoticed date of December 29, 2009. The hearing was not noticed nor held in compliance with the statutory provisions of Idaho Code 18-8002A. Thus, the decision upholding the license suspension should be vacated as the agency's decision (a) violated statutory or constitutional provisions; (b) exceed the

agency's statutory authority; and/or (c) was made upon unlawful procedure.

III. THE NECESSARY ADVICE OF THE CONSEQUENCES OF THE BREATH TESTING WAS LACKING, RESULTING IN NO IMPLIED CONSENT AND A VIOLATION OF DUE PROCESS

Idaho Code § 49-335(2) provides that "[a]ny person who operates a commercial motor vehicle or who holds a class A, B or C driver's license is disqualified from operating a commercial vehicle for a period of not less that one (1) year if the person refuses to submit to or submits to and fails a test to determine the driver's alcohol, drug or other intoxicating substances concentration while operating a motor vehicle." The Notice of Suspension form served upon Peck (Agency R., pgs 1-2) fails to satisfy the notice requirements of Idaho Code and of due process, as it fails to give notice of the provisions and consequences of Idaho Code § 49-335(2). As in the circumstances of Wanner v. State, Dept. of Transp., 150 Idaho 164, 244 P.3d 1250, 1252 (2011), the Notice does "...not address the situation presented by the underlying facts of this case: the consequences of refusing or failing evidentiary testing for the holder of a CDL who was not operating a commercial vehicle at the time of contact with law enforcement. This is significant because I.C. § 49-335(2) provides that a motorist who fails evidentiary testing is disqualified from operating a commercial vehicle for not less than one year."

The Idaho statutes for alcohol testing in Idaho Code §§ 18-8002 and 18-8002A are based upon implied consent. The statutory fiction of implied consent is conditioned upon notice of the

consequences being given to the driver immediately prior to the testing. Without proper notice, the driver has not given implied consent and the license cannot be suspended.

Evidentiary testing for blood alcohol is a seizure of the person and a search for evidence. Pursuant to the Fourth Amendment to the United States Constitution, Peck has a substantial right to be free of search or seizure. See State v. Cooper, 39 P.3d 637, 136 Idaho 697 (2001). In order to have a search and seizure, a driver's informed or implied consent must be based upon an accurate advice of the consequences. Here there is no advice given prior to the request for testing that a person's CDL privileges are impacted differently than the other driving privileges in the advisory (one year as opposed to 90 days). As such there is not sufficient advice. The legal rational and analysis is the same as if the consequences of the "standard" advisory form were not read to the driver at all. The outcome is the same on the advisory form's advice whether given or not: take the test and fail OR refuse the test and the driver faces the same suspension result. There is no basis to uphold a suspension if the results of the decision are the same. The case law is exactly the opposite. The law requires the advice to be given to the driver to "validate" the implied or informed consent.

As explained in Matter of Virgil, 126 Idaho 946, 947, 895 P.2d 182, 183 (Idaho App. 1995), "Idaho law requires strict adherence to the statutory language ..." which provides notice. Further, a driver's license is to be reinstated if the driver is "not completely advised of his rights and duties." Matter of Virgil, 126 Idaho 946, 947, 895 P.2d 182, 183 (Idaho App. 1995)

citing Matter of Griffiths, 113 Idaho 364, 370, 744 P.2d 92, 98 (1987). Also, as set forth in Halen v. State, 136 Idaho 829, 833-834, 41 P.3d 257, 261 - 262 (Idaho 2002) the warrantless search exception is based upon the implied consent. Implied consent requires notice of one's rights and the consequences. As no notice is given of the disqualification provisions of Idaho Code § 49-335(2), there is no implied and no informed consent. Thus without being informed of the statutory provision, the testing is not upon consent, and violates due process. The hearing officer's decision should be vacated as it (a) violates statutory or constitutional provisions; (b) exceeds the agency's statutory authority; (c) is made upon unlawful procedure; (d) is not supported by substantial evidence in the record; or (e) is arbitrary, capricious, or an abuse of discretion.

IV. THE AFFIDAVIT AND TEST RESULTS ARE LACKING TO SUPPORT SUSPENSION

The Affidavit and test results used to sustain the suspension (Agency R., pgs 3-8) are defective in that the documents fail to identify the alleged acts as occurring in the State of Idaho, indicate Sim. Check No. 0008 and 0009 having variations of .005, and show the officer's statements in the narrative directly contrary to the officer's statements in the check the box portions of affidavit. The affidavit fails to identify the State of Idaho as the location of the contact. This same affidavit asserts in the narrative that certain tests were not administered, but in the check the box portion asserts the tests were given and failed.

Taken as a whole, the credibility of the affidavit and test results are lacking on their face. This argument is not that there are technical defects or lacking defects in the Department's documentation, but rather credibility is lacking to support the alleged facts and/or suspension. Thus the decision should be vacated as it (d) is not supported by substantial evidence in the record; or (e) is arbitrary, capricious, or an abuse of discretion.

V. THERE WAS NO PROBABLE CAUSE GROUNDS FOR THE STOP

The Affidavit used to sustain the suspension (Agency R., pgs 5-8) and the traffic citation No. 41744 asserts the basis for the stop as traveling 45 mph in a posted 35 mph zone, with visual estimation and radar indicating 45 mph, in violation of Idaho Code § 49-654(2).

Idaho Code § 49-654(2) contains two provisions for 35 mile per hour speed zones, specifically in subparagraphs (a) and (b), as follows:

> (a) Thirty-five (35) miles per hour or a lesser maximum speed adopted pursuant to section 49-207(2)(a), Idaho Code, in any residential, business, or urban district.
>
> (b) Thirty-five (35) miles per hour in any urban district.

Idaho Code § 49-105(11) provides the definition for district as follows: "District" means:

> (a) Business district. The territory contiguous to and including a highway when within any six hundred (600) feet along the highway there are buildings in use for business or industrial purposes, including hotels, banks or office buildings, railroad stations and public buildings which occupy at least three hundred (300) feet of frontage on one side or three hundred (300) feet collectively on both sides of the highway.

(b) Residential district. The territory contiguous to and including a highway not comprising a business district when the property on the highway for a distance of three hundred (300) feet or more is in the main improved with residences, or residences and buildings in use for business.

(c) Urban district. The territory contiguous to and including any highway which is built up with structures devoted to business, industry or dwelling houses. For purposes of establishing speed limits in accordance with the provisions of section 49-654, Idaho Code, no state highway or any portion thereof lying within the boundaries of an urban district is subject to the limitations which otherwise apply to nonstate highways within an urban district. Provided, this subsection shall not limit the authority of the duly elected officials of an incorporated city acting as a local authority to decrease speed limits on state highways passing through any district within the incorporated city.

There is no testimony or evidence in the record by the Officer other than the general assertion of a posted speed limit of 35 mph. There is no factual statement of any specific sign or any specific posting of a speed limit. There is no testimony or evidence in the record by the Officer or otherwise, as to the speed zone, and the uncontroverted testimony of Peck is that there were no buildings or structures occupying the sides of the highway necessary to meet the statutory definition of business district, residential district, or urban district. There were no structures or buildings in use for business or industrial purposes, including hotels, banks or office buildings, railroad stations and public buildings (Business District). There were no structures or buildings in the main improved with residences, or residences and buildings in use for business (Residential District). There were no structures or buildings built up with structures devoted to business, industry or dwelling houses

(Urban District). Therefore, the speed limit on Highway 200 and US 95 in the location of the contact is controlled by Idaho Code § 49-654(2)(d) providing for a limit of 65 miles per hour.

When presented with the uncontroverted facts and argument, the hearing examiner concluded in the Findings of Fact and Conclusions of Law and Order entered the 8th day of January, 2010 Agency Record, pages 49-50, that "...it is assumed this area of highway met the requirements of Idaho Code §49-654(2)(a) and/or (b) even though there are no structures or buildings in the area prior to Peck being stopped." The hearing examiner cannot "assume" matters not in the record, and which are contrary to the statutory basis for the stop, and/or which are controverted by specific uncontested testimony of the Petitioner. See Bennett v. ITD, 147 Idaho 141 (Id.Ct.App. 2009), discussed in further detail below.

Peck's argument can be summarized as follows: The statutorily defined District sets the applicable speed limit. A speed limit sign posted contrary to the statute is of no effect. The posting is void and ultra vires. In other words, the sign does not control the speed limit; rather the statutory definitions and provisions define the speed limit. A sign posted contrary to the law, is of no effect. As described in Dabestani v. Bellus, 131 Idaho 542, 549, 961 P.2d 633, 638-640 (1998), a posted speed limit sign not in conformance with the actual speed limit is of no force and effect.

It cannot be presumed or even assumed that a posted speed limit sign controls what statutory District exists. If this were the case, the statutes would simply provide for all speed limits

to be set by posting, not by District definition. The posting must comply with the District, as defined by statute, to be valid and enforceable.

The ITD has argued that a city can lower the 45 mile per hour speed within the Urban District pursuant to Idaho Code 49-105(11(c). In order for this provision to be applicable, Peck would have had to have been in an Urban District (and proof of a city acting would be necessary). As irrefutably established by the evidence, the portion of the highway upon which Peck was traveling, was NOT in an Urban District. Therefore, it is irrelevant if an incorporated city acted or not, because an incorporated city only has authority to act in the Urban District, not outside of an Urban District.

The ITD and its hearing officer cannot "assume" matters not in the record and contrary to the statutory scheme establishing speed limits. Thus, the hearing officer's finding that probable cause grounds existed for the stop is not supported by substantial evidence in the record as a whole and the decision should be vacated.

VI. THE BAC TESTS ARE INVALID AS THE TESTING DID NOT MEET THE APPLICABLE PROCEDURES

Pursuant to I.C. § 18-8004(4), the Idaho State Police ("ISP") are charged with promulgating standards for administering tests for breath alcohol content and the ISP has issued operating manuals establishing procedures for the maintenance and operation of breath test equipment. Pursuant to In Re Mahurin, 140 Idaho 656, 659, (Idaho App. 2004), noncompliance with the maintenance

and operation procedures is a ground for vacating an administrative license suspension under I.C. § 18-8002A(7)(d). As set forth in State v. Carson, 133 Idaho 451, 453 (Idaho App. 1999) and Bennett v. Idaho Dept. of Transportation, 147 Idaho 141, 144-145 (Idaho App. 2009), the pertinent portion of the manual instructs:

> Observe the subject for 15 minutes. During this time, the subject may not smoke, consume alcohol, belch, vomit, use chewing tobacco, or have any other substance in the mouth. If belching or vomiting does occur or something is found in the mouth, wait an additional 15 minutes.

Peck testified that he belched during the monitoring period, less than a minute before taking the breath test. The fact of the audible belch and physical actions accompanying the audible belch are not controverted. The monitoring period is required in order to rule out the possibility that alcohol or other substances have been introduced into the subject's mouth from the outside or by belching or regurgitation. Carson, 133 Idaho at 453. Only the officer's probable cause affidavit was submitted to the record in support of the suspension. The officer's form affidavit provides only generalized statements regarding employment of proper procedures. Peck presented uncontroverted specific facts of the belch.

Peck met his burden to prove grounds to vacate the suspension of his license, as he testified to the belch. The hearing officer did not find Peck's testimony to lack credibility and in fact had no basis upon which to find. When presented with the uncontroverted specific facts and argument, the hearing examiner concluded in the Findings of Fact and Conclusions of Law and Order entered the 8th day of January, 2010 (R. page 51) that

the test was performed in compliance with the standards. Peck's testimony demonstrates that proper monitoring procedures were not followed, and that the test for alcohol concentration was, therefore, not conducted in accordance with the requirements of I.C. § 18-8004(4). The officer's general, non-specific affidavit is insufficient to support a finding when compared to the credible evidence of Peck that demonstrates a violation of proper procedures. See generally Bennett v. Idaho Dept. of Transportation, 147 Idaho 141, 144-145 (Idaho App. 2009). Thus, the hearing officer's finding that the breath test was conducted in compliance with procedural standards is directly contrary to the Bennett holding.

There is no means by which to distinguish the Bennett case and holding from this matter. In Bennett v. Idaho Dept. of Transportation, 147 Idaho 141, 144-145 (Idaho App. 2009), the officer's affidavit asserted *general* compliance with the testing procedures (which would include that he was present to observe during the observation period). In this circumstance the officer's affidavit likewise asserts *general* compliance with the testing procedures (which would include that he did not observe any belch). In Bennett, the *specific* testimony was that the officer did not observe during the entire observation period. In this circumstance, the *specific* testimony by Peck is that the officer did observe a belch during the observation period. The facts and the holding of Bennett fall squarely in line with the pending issue. The hearing officer did not have any credible specific evidence from the officer's *general* affidavit that Peck did not belch to refute the *specific* testimony of Peck.

Peck's testimony demonstrates that proper monitoring procedures were not followed, and that the test for alcohol concentration was, therefore, not conducted in accordance with the requirements of I.C. § 18-8004(4). There was no specific conflicting evidence presented by the hearing officer. Thus, the hearing officer's finding that the breath test was conducted in compliance with procedural standards is directly contrary to the Bennett holding, and is not supported by substantial evidence in the record as a whole. The decision should therefore be vacated.

VII. IS IDAHO CODE § 12-117 AGAIN APPLICABLE TO JUDICIAL REVIEW

Notwithstanding the most recent rounds of appellate Court interpretation and legislative amendments to Idaho Code § 12-117, Peck seeks to maintain the possibility to recover attorney fees against the State of Idaho, Department of Transportation, pursuant to Idaho Code § 12-117, which governs the award of attorney fees in proceedings between persons and state agencies.

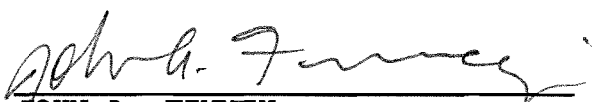
When applicable to a proceeding, Idaho Code § 12-117 is not a discretionary statute. It provides that the court *shall* award attorney fees upon a finding that the state agency did not act with a reasonable basis in fact or law. Idaho Dept. of Law Enforcement v. Kluss, 125 Idaho 682, 685 (1994). The policy behind I.C. § 12-117 is: "1) to serve as a deterrent to groundless or arbitrary agency action; and 2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies never should ha[ve] made." Id., (quoting Bogner v. State Dep't of Revenue & Taxation, 107 Idaho 854, 859 (1984)).

Here, the Department's hearing officer's decision has no basis in law or fact to uphold the Peck's suspension. The hearing officer cannot ignore credible, specific, and uncontroverted evidence or make conclusions directly contrary to law. The conduct invokes both purposes of the statutory policy, and attorney fees should be awarded to the Peck to discourage such conduct and to allow recovery for the unjustified financial burden placed on the Peck by the hearing officer's erroneous decision.

CONCLUSION

As set forth above, for any of the several grounds asserted, the decision of the Hearing Examiner sustaining the Notice of Suspension should be vacated, as well as the District Court's decisions sustaining the suspension. The relief sought is to reverse the Findings of Fact and Conclusion of Law and Order by denying and/or vacating the suspension of the Peck's driving privileges, to reinstate the driving privileges, and if applicable, for an award to Peck of attorney fees and costs against the Respondent.

RESPECTFULLY SUBMITTED this 12th day of July, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2011, two (2) true and correct copies of the foregoing, were served by deposit in the U.S. Mail, postage prepaid, and were addressed to:

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